The appellants pleaded their failure to commence within the year was due to circumstances beyond their control and not to any wanton failure on their part, these being —

"(a) the directions of the Pemungut Hasil Tanah, Kuala Lumpur in refusing to allow the use of State Land Lot 4634 (which was originally approved by the Merinyu Galian, Kuala Lumpur as a dumping area for the proposed mine and thereby rendering such approved scheme incapable of being carried into effect);

(b) stipulation in the Hydraulic Licence issued by the appropriate authority the first defendants were to work initially on Lot 2410 adjacent to the land under the said sublease which said Lot 2410 would have to be used as a tailing dumping area. Pursuant thereto mining operation has had to be commenced on Lot 2410 first and working towards Lot 2411; and in the premises the first defendants aver that they and the second defendant were frustrated by the intervening events enumerated above from commencing mining operations within the 12 months' period;"

The respondent had not challenged these facts, but contended that he was still entitled to his claim because the appellants could have applied immediately to aggregate the two mining lands under the provisions of the Mining Enactment. It seems to me that this is a red herring for the reason Lot 2411 cannot be worked was for lack of a dumping area, which was not available until Lot 2410 had been mined.

I do not propose to say more on this as the learned judge apparently considered only clause 9 of the Annexure as the passages quoted from his judgment bear out. As it was conceded by the appellants' Counsel that Lot 2411 was worked only from October 16, 1972, the judge was satisfied that this was some six months out of time stipulated in clause 9. The provisions of clause 8 of the Annexure relating to cancellation while specifying a breach of clause 7 as one of the four grounds did not include clause 9 as one of them. *Expressio unius est exclusio alterius.* Should a power to impose such a strict penalty as cancellation be inferred in the absence of express words? Assuming however that such a power can be inferred, is it mandatory or discretionary? Following section 97(ii), cancellation must be in the discretion of the court. The judge was of the view the appellants had to accept the responsibility for non-compliance with clause 9 because they *could have put up a scheme* which would enable them to commence mining operations on Lot 2411 within the time stipulated under the sub-lease and they *ought to have taken clause 9 into account* when putting up a new mining scheme for approval. He had given undue weight to the evidence of PW2, Dinyati bin Tirman, who was asked: "Could the defendants submit a mining scheme siting the palong and working area on Lot 2411 instead of Lot 2410?" and answered: "It is possible." As he (the judge) said he rejected the appellants' contention that the delay was due to circumstances beyond their control *"for the simple reason that they had clearly omitted to put up mining scheme that would enable them to commence mining operations on Lot 2411 within the time stipulated under the sub-lease. Such a scheme was possible."* No elaboration was sought of the witness Dinyati concerning the feasibility of that scheme but the witness Phun said that to site the palong on Lot 2411 the work could only be carried out provided the dumping is done on Lot 2410. Would it be good mining practice to utilise good mining land for dumping? Lot 2410 was under Mining Title. I therefore respectfully disagree with the learned judge's finding that clause 9 had been breached. The scheme approved on October 26, 1971 itself provided that work should commence on Lot 2410 and move towards Lot 2411. It is therefore clear that such breach would only occur if there was undue delay in doing so. In any event, it is my view that *cancellation for breach of clause 9 is not empowered by clause 8 of the Annexure.*

I would therefore set aside the judgment of the learned judge ordering cancellation of the sub-lease of 12th day of April, 1971 and delivery of possession of the land, also that part of the judgment restraining the Appellants and their servants or agents from mining the said Mining Land and for payment of the sum of $6,539.58 by way of damages. As the appellants have succeeded on their appeal, it would not be necessary to deal with the counter-claim. The respondent will pay the costs of the appellants, both here and in the court below.

Gill C.J. and **Ali F.J.** concurred.

Appeal allowed.

Solicitors: *Allen & Gledhill; Skrine & Co.*

H.M.T. v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) March 1, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 54 of 1974]

Income Tax — Payment of gratuity on retirement — Taxpayer employed on short term contracts — Termination in accordance with provisions of contract — Whether compensation for loss of employment — Income Tax Ordinance, 1947.

The appellant had been employed by a company on short term contracts, the first for a term of four years, and then subsequently for two further terms of three years each. On completing the service under the third contract, the appellant left for Denmark on five months' leave with a return ticket for himself and his family and leaving much of his belongings in Malaysia. While still on leave he was informed by his employers that they were terminating his contract of service. He was given the requisite notice of termination in accordance with the provisions of the contract. He was then 34 years old and had worked for the company for a continuous period of just over 10 years. The company paid him his salary and allowances and also a sum of $74,954.32 as gratuity on retirement. He was assessed to tax on this sum and on appeal to the Special Commissioners, it was held that the sum was granted to the appellant in respect of his employment with the company and was therefore a gratuity within the meaning of section 10(2)(a) of the Income Tax Ordinance, 1947. An appeal to the High Court was dismissed ([1974] M.L.J. 211) and the appellant appealed to the Federal Court.

Held, allowing the appeal: the appellant in this case had a real prospect of continued employment from contract to contract and therefore the payment to him was compensation for loss of employment and not taxable, under the Income Tax Ordinance, 1947.

Cases referred to:-

(1) *Comptroller-General of Inland Revenue* v. *T.* (*Knight's* case) [1972] 2 M.L.J. 73.

(2) *Beynon* v. *Thorpe* 14 T.C. 1, 14.

(3) *H.* v. *Comptroller-General of Inland Revenue* (*Heywood's* case) F.C. [1973] 2 M.L.J. 43.

(4) *H.* v. *Comptroller of Inland Revenue* P.C. [1974] 2 M.L.J. 135.

(5) *Henry* v. *Foster* (1931) 16 T.C. 905, 634.

(6) *Chibbett* v. *Joseph Robinson & Sons* (1924) 9 T.C. 48.

FEDERAL COURT.

S. Woodhull for the appellant.

Mohamad Nizar bin Idris (Senior Federal Counsel) for the respondent.

Gill C.J.: This is yet another appeal in which the question to be decided is whether the money paid to the appellant by his employers on the termination of his employment is liable to income tax under the Income Tax Ordinance 1947.

The relevant provisions of the Ordinance are section 10(1)(b) which provides that income tax shall be payable in respect of "gains or profits from any employment", section 10(2)(a) which says that for the purposes of paragraph (b) of sub-section (1) "gains or profits from any employment" means "any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowances . . . paid or granted in respect of the employment whether in money or otherwise", and section 13(1)(i) which states that there shall be exempt from tax "sums received by way of retiring or death gratuities or as a consolidated compensation for death or injuries".

The facts of the case as found by the Special Commissioners of Income Tax are as follows. The appellant was first employed as an assistant by the United Plantations Limited (hereinafter called 'the Company') on January 16, 1955 on contract for a term of 4 years, after which he had a second contract for a term of 3 years. There was no documentary evidence available in respect of those two contracts, the prevailing practice being for all contracts of service of expatriate staff to be made and signed in Copenhagen. The third and final contract of service between the appellant and the Company was signed in Denmark on January 18, 1962 for a term of 3 years commencing on April 28, 1962, with a provision for its termination by 3 months' notice on either side. A document issued by the company and called the "Standard Terms for Expatriate Staff Members" formed part of the terms of the contract.

On completing his service under his third and final contract, the appellant left for Denmark on March 9, 1965 on 5 months' leave with a return ticket for himself and his family and leaving much of his belongings in Malaysia. Whilst still on leave he was informed by his employers in Denmark that they were terminating his contract of service with the company, and he was given the requisite notice of termination in accordance with the provisions of the contract. He was then 34 years old and had worked for the company for a continuous period of just over 10 years. He was paid his normal salary and allowance up to the last day of his leave, and his employment with the company ceased on August 3, 1965. At a meeting of the Board of the company held at Copenhagen on March 23, 24, 1966, it was decided to grant the appellant "as gratuity on retirement" a sum of $74,954.32 and payment was made to him on April 14, 1966.

By a notice of additional assessment dated July 27, 1968, the respondent assessed tax on the said sum of $74,954.32 which was entered in the notice against the item "Bonus, etc.", in respect of the assessment of the appellant's income tax for the year of assessment 1965. The appellant, having appealed unsuccessfully against such assessment first to the Special Commissioners of Income Tax and then by way of case stated to the High Court, has now brought this further appeal to this court.

At the hearing before the Special Commissioners, the appellant submitted that the payment made to him by the company was not a contractual payment but a capital sum paid by the company of its own volition by way of compensation for loss of employment, so that it was not assessable to tax under the Ordinance as there was no provision in the Ordinance for tax to be levied on compensation for loss of office paid to an employee before or after his employment ceased. He contended that it was a voluntary payment and not in respect of employment, made 9 months after the actual termination of his employment and therefore outside the scope of the Ordinance. In the alternative, he contended that it was a retiring gratuity within the meaning of section 13(1)(i) of the Ordinance and therefore exempt from income tax.

The contentions on behalf of the respondent before the Special Commissioners were as follows. The payment made to the appellant was not a capital payment in the nature of compensation for loss of employment, as compensation presupposes a premature termination of service. The appellant was employed on contract for a term of 3 years on the completion of which his services were terminated under the terms of the contract. Both parties had complied with and there had been no breach of the terms of the contract of service. There had therefore been no premature termination of the appellant's employment, it being a case of the Company not renewing the contract after it lapsed by effluxion of time. This was fortified by the appellant's own statement in his letter in which he said that his contract was not renewed. The payment was not a voluntary payment as a personal gift to the appellant. It was a payment made to him in respect of his employment with the company, even though it was made some time after the termination of his employment. It was therefore a gratuity within the meaning of section 10(2)(a) of the Ordinance and thus liable to tax as "gains or profits from employment" under section 10(1)(b).

It was further contended that the payment was not a retiring gratuity so as to qualify for exemption from income tax, and it was distinguishable from the payment in *Knight's* case (*Comptroller-General of Inland Revenue* v. *T*[1]) in which there was a contract of general hiring for an unspecified period. It was submitted that in the present case the appellant was on a contract of service for a term of 3 years and his services were terminated at the age of 34 years, so that such retirement from service could not be said to be a normal retirement. It was also not true, it was argued, that the sole reason for the termination of the appellant's services was the stringent Malayanisation policy of the Government, as the so called policy was

nothing more than proposals put forward by the Ministry which were never fully implemented by the Government.

In the event, the Special Commissioners made the following findings. As the appellant's services were terminated in accordance with the terms of his contract, so that there was no premature termination of employment, the payment made to him could not be compensation for loss of employment. As this was not a case of the appellant retiring from the service of the Company but a case of his contract not being renewed, the payment made to him was not a retiring gratuity within the meaning of section 13(1)(i) of the Ordinance. The sum of $74,954.32 was granted to the appellant in respect of his employment with the company for a period of just over 10 years. It was therefore a gratuity within the meaning of section 10(2)(a) of the Ordinance, and as such liable to income tax under section 10(1)(b) of the Ordinance.

At the hearing of the appeal in the High Court before Abdul Hamid J., counsel for the parties to the appeal delivered written submissions in which they put forward the same arguments as they had advanced before the Special Commissioners. In support of the contention that the payment made to the appellant was a voluntary payment in the nature of a personal gift after he had ceased to hold office and therefore not within the scope of the Ordinance, counsel for the appellant cited the following passage from the judgment of Rowlatt J. in *Beynon* v. *Thorpe*[2]: —

"It is nothing but a gift moved by the remembrance of past services already efficiently remunerated as services in themselves; it is merely a gift moved by that sort of gratitude or that sort of moral obligation if you please: it is merely a gift of that kind. In this case it happens to be very large; in many cases it is very small, but in all the cases it seems to me, whether it is a large gift like this or whether it is a small gift to a humble servant, they are exactly on the same footing as gifts which are made to a child or gifts which are made to any other person whom the giver thinks he ought to supply with funds for one reason or another;"

The learned judge found no merit in that contention for the reason that the facts in that case differed materially from the facts of the present case.

As regards the contention that the payment to the appellant was either compensation for loss of employment or a gratuity on retirement, counsel for the appellant relied on the decision of the Privy Council in *Knight's* case. But counsel for the respondent submitted that the present case was to be distinguished from *Knight's* case in that the employment in that case was in the nature of a general hiring as opposed to the employment on contracts for fixed periods in this case. For his contention that the payment was an *ex-gratia* payment in the nature of a gratuity and not compensation for loss of employment, he relied on the decision of this court in *Heywood's* case (*H.* v. *Comptroller-General of Inland Revenue*[3]) in which the facts were admittedly similar to the facts in this case.

On the controversy over the question of retiring gratuity the learned judge made a finding which is stated in his judgment as follows: —

"After consideration I form the view that the Special Commissioners were right in coming to the conclusion that the payment was not a retiring gratuity but a gratuity paid in respect of his employment with the company. This payment was not of the same nature as that made in *Knight's* case. There the notice by the company terminating the service of the taxpayer seemed to have produced the effect of retiring the taxpayer prematurely. T's employment was regarded as one which, unless the employers wanted him to go, was likely to continue as long as he faithfully carried out his duties. This was not so in the present case. Another important feature in regard to this payment which distinguishes it from the payment made in *Knight's* case is that, there, the so-called redundancy pay, held by the Federal Court to be compensation for loss of office or retiring gratuity, was in fact a payment 'following a prior agreement or understanding.' In the present case there was no such agreement or understanding requiring the company to make any payment to the appellant."

The conclusion at which the learned judge arrived was that the payment made to the appellant fell within the category of and was of the same nature as the payment made to the taxpayer in *Heywood's* case. His reasons for that conclusion are stated in his judgment as follows:

"Although in *Heywood's* case the payment was made following a scheme drawn up by the company *ex-parte*, I am of the opinion that this should not alter the fact that the payment to the appellant was a gratuity paid in respect of the appellant's employment with the company. Even though the company describe it as 'gratuity on retirement' such payment was not paid following any particular scheme drawn up by the company and neither was it paid pursuant to any provision in the service agreement. The appellant was clearly employed by the company for fixed terms under the contract of service which imposed no obligation on the company to make any payment..."

He then goes on to say: —

"Although the company made the payment on its own accord it was clearly meant to be an *ex-gratia* payment made in reference to the services rendered by the appellant in the nature of a reward at the end of the contract period.... To my mind the payment was in fact made to the appellant solely in respect and for reasons of his employment with the company for over ten years and such payment was therefore gains or profits from an employment in respect of which tax is assessable."

It is clear that in the final analysis the learned judge founded his judgment on the decision of this court in *Heywood's* case, which of course was binding on him by reason of the similarities of facts in both cases. In *Heywood's* case the tax-payer was employed under five separate contracts for fixed periods, whereas the taxpayer in this case had three contracts also for fixed periods. In that case, as in this case, the final contract was terminated by a valid notice in writing. *Heywood's* case was decided under the 1967 Act, whereas this case fell to be decided under the 1947 Ordinance. The basic question in each case, however, was the same, namely, whether the payment was compensation for loss of employment. Under the Act sums paid as compensation for loss of employment are chargeable to tax but they are exempted from tax if they do not exceed the prescribed limit. Under the Ordinance, however, they are not chargeable to tax at all. The only difference between the two cases would appear to be that in *Heywood's* case there was a scheme for calculating the compensation, whereas there was no such scheme in this case. Perhaps there was also this difference, that in *Heywood's* case the employers called the payment compensation for loss of employment, whereas in this case it was called "a gratuity on retirement", although in some of the letters written to the respondent subsequently the employers in the present case called the payment compensation for loss of employment or office.

The learned judge distinguished this case from *Knight's* case in the same way as both the High Court and the Federal Court had distinguished *Heywood's* case from that case. This is clear from his citation of various passages from the judgments of the High Court and of the Federal Court in support of his ultimate decision. *Heywood's* case, however, had gone up on further appeal to the Privy Council. Shortly before this appeal came up for hearing before us, their Lordships of the Privy Council gave their decision advising the Yang Dipertuan Agung that the appeal should be allowed and the four assessments made on the appellant discharged, thus reversing the decision of the Federal Court.[4] The result was that counsel for the appellant made a brief submission in the course of which he said that, apart from resting his case on his written submissions in the court below and relying on the decision of the Privy Council in *Heywood's* case, he would lay emphasis on his main ground of appeal that the sum paid to the appellant upon the cessation of his employment was paid as compensation for loss of employment which was not specifically charged to tax under the 1947 Ordinance.

His arguments in support of this main ground of appeal proceeded on these lines. On the facts the appellant had every reasonable expectation of remaining in employment until the age of 55, even though there was no express provision for renewal of each of the contracts either in the final contract or in the standard terms. The facts in this case were almost identical with the facts in *Heywood's* case. The element of expectation in this case was more manifest in that the appellant was provided with a return ticket for himself and his family. There was some evidence that on his return he was to be made the manager of an estate. There was also some evidence that the appellant's services were terminated on account of Malayanisation. A payment on deprivation of an expectation of employment should be treated as compensation for loss of employment regardless of what it was called by the employers.

Counsel for the respondent started off by saying that his submissions would be similar to the submissions which he made to the High Court, except that he could no longer rely on what was said in *Heywood's* case by the Federal Court. He then delivered written submissions in which he said that the *ratio decidendi* in *Heywood's* case could not be applied to the facts and the law in this case. The basis of this *rato decidendi*, he said, was the scheme which made provision for payment of compensation for loss of future employment, which seemed to indicate that their Lordships had thrown overboard the general principle that in deciding the nature of any payment the name given to it by the parties was not decisive. He contended that as far as this case was concerned there was nothing in the facts to indicate that the payment was compensation for loss of employment. There was no scheme of compensation as in *Heywood's* case. The payment was not called compensation. Nor was the appellant's employment likely to continue. The only fact relied on in support of a likelihood of continued employment was delivery of return tickets for the appellant and his family. The employment and re-engagement was done in Denmark, so that the general manager in Malaysia was not concerned with the re-employment of any contract officer. Finally, there were no letters to indicate that the appellant was likely to be re-employed.

I do not agree with what counsel for the respondent said about the *ratio decidendi* of the Privy Council in *Heywood's* case. In my judgment the basis of their Lordships' decision was that there was a real prospect of employment until the appellant reached the age of 55, though that service might be terminated in accordance with the contract of service before the appellant reached that age. As their Lordships went on to point out, the scheme in that case was not designed for anything other than the calculation of the amounts to be paid as compensation for loss of future employment. They further said that a payment made for compensation for loss of employment cannot be made in respect of employment or in respect of having or exercising an employment, as the two things are mutually exclusive.

I also do not agree that their Lordships have thrown overboard the principle that the question always is what is the real character of the payment and not what the parties call it. It is common ground that the employers in this case called the payment a gratuity on retirement. As there was evidence that the normal retiring age of the company's employees was 55, it would be incorrect, in my judgment, to treat it as a retiring gratuity. I say this notwithstanding what I said on the question in my judgment in the Federal Court in *Knight's* case. On reflection I have very little hesitation in saying that what I said in that case was wrong. The question was considered by the Privy Council but their Lordships expressed no final opinion on it. Suffice it to say that the termination of the appellant's employment at the age of 34 years and after he had served for only ten years cannot be said to be a retirement from service. The payment made to him therefore was not a retiring gratuity, although I am prepared to agree with counsel for the respondent that it was a gratuity pure and simple.

Having said that the payment to the appellant in this case could be rightly called a gratuity, the question is whether it is liable to income tax. In *Knight's* case, Lord Wilberforce delivering the judgment of their Lordships of the Privy Council said:

> "But it remains the case that, in order to be taxable a gratuity must be paid in respect of employment — many gratuities are so paid such as 'tips' and these no doubt are taxable. If the gratuity is not so paid, but is paid in respect of termination of employment it is not taxable."

That the so-called gratuity in this case was paid in respect of termination of the appellant's employment is, in my judgment, not open to question. Similarly it is not open to question that the gratuity paid was not in respect of employment because it was not a sum of money paid under the appellant's contract of employment.

That brings me to the final question as to whether this so-called gratuity was in fact compensation for loss of employment. Compensation for loss of office means a payment to the holder of an office as compensation for being deprived of profits to which as between himself and his employer he would, but for

an act of deprivation by his employer, have been entitled. (Per Romer L.J. in *Henry* v. *Foster*[5]). In *Chibbett* v. *Joseph Robinson & Sons*[6] it was held that money paid on the termination of employment, which need not continue but was likely to continue, must be treated as compensation for loss of employment. That statement of the law was approved by their Lordships of the Privy Council in *Knight's* case and *Heywood's* case. In *Heywood's* case it was held that even if the appellant was employed under a series of contracts for fixed periods and not under a contract of general hiring, he had a real prospect of employment until he reached the age of 55. The facts of this case are almost identical with the facts of that case. I must therefore hold that the appellant in this case had a similar prospect of continued employment from contract to contract. The payment made to him was therefore compensation for loss of employment. The fact that there was no scheme for calculating such compensation, as there was in *Heywood's* case, makes no difference, because we are not concerned with the basis on which the compensation was calculated. Even if the amount paid to the appellant is to be treated as a gratuity, so long as it was paid in respect of termination of his employment, it is not taxable.

I would allow this appeal with costs both here and in the court below and set aside the assessment of income tax against the appellant.

Ong Hock Sim and **Wan Suleiman F.JJ.** concurred.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. A.L.B. CO. SDN. BHD.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) March 1, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 90 of 1974]

Income Tax — Company carrying on tobacco business — Company renting out premises — Liability to tax for rents — Whether company entitled to have the losses from tobacco business set off against rental income — Whether unabsorbed capital allowances can be set off against rental income — Income Tax Act, 1967, ss. 4, 5, 42, 43 and Schedule 3, para. 75.

This was an appeal against the decision of Hashim Yeop A. Sani J. ([1974] 2 M.L.J. 76). The respondent company was incorporated with the object *inter alia* of carrying on a tobacco business. For this purpose it purchased land and built a factory. Subsequently the company found that it was not profitable to carry on the tobacco business and it ceased to do so. The land and buildings were let out to other companies. The company was assessed for income tax on the rental income and it sought to have the unabsorbed losses on the tobacco business and the unabsorbed capital allowances set off against the rental income. It was held by Hashim Yeop A. Sani J. that the Special Commissioners were correct in holding that by renting out the portions of the factory building the respondent company were carrying on a business and that the unabsorbed losses could be set off against the rental income. He held however that the unabsorbed capital allowances could not be taken into account in computing the incomes from rents of the respondent company. The Director-General of Inland Revenue appealed and the respondents cross-appealed.

Held, allowing the appeal and dismissing the cross-appeal:

(1) on the facts of this case it seemed clear that the only business which the respondents carried on was its tobacco business, so that it was quite impossible to say that they were carrying on a business of renting their premises;

(2) both the Special Commissioners and the learned judge were therefore wrong in holding that the respondents were carrying on the business of renting and that the unabsorbed losses from the tobacco business could be deducted from the rental incomes;

(3) the respondent's unabsorbed capital allowances relate only to their tobacco business and could not be taken into account even if the renting of their premises could be assumed to be a business.

Cases referred to:-

(1) *Commissioners of Income Tax* v. *Hanover Agencies* [1967] 1 All E.R. 954, 956.

(2) *Fry* v. *Salisbury House Estate Ltd.* 15 T.C. 266, 316.

FEDERAL COURT.

Mohamad Nizar bin Idris (Senior Federal Counsel) for the appellants.

J. Puthucheary for the respondents.

Gill C.J.: This is an appeal from a judgment of Hashim Sani J. on a case stated by the Special Commissioners of Income Tax on the requisition of the appellant. The facts of the case as found by the Special Commissioners are as follows. The respondent company was incorporated on September 2, 1960 with the main object of carrying on a tobacco business. Having purchased for this purpose a piece of land in Petaling Jaya and built thereon a factory to house the cigarette machinery and a bonded warehouse for stocks of cigarettes and tobacco, the company commenced its business on February 14, 1961. Its financial year ended on 30 September.

Initially, the respondents were concerned with cutting and blending tobacco leaves in order to bring them to a condition suitable for rolling into cigarettes. Finding it not profitable to carry on with their tobacco business, they ceased to operate their machinery in November 1961. They also stopped trading in tobacco in 1964 and had no sale of tobacco in 1965. In 1967 their plant and machinery were sold and removed from the factory.

From April 1964 the respondents started granting licences to various companies for the use and occupation of their premises in return for a monthly rental. At first they let out only a part of their premises, but from October 1968 they granted a licence to Gammon South East Asia Berhad for the use and occupation of all their land and the buildings thereon. One of the numerous objects of the respondent company, as contained in paragraph 3(1) of their memorandum of association, was to lease or grant licences over their property.

On August 22, 1970 the Department of Inland Revenue prepared the respondents' tax computation for the years of assessment 1963 to 1970. This showed an accummulated loss of $399,303/- and an un-utilised capital allowance for the industrial buildings of $82,662/- for the year of assessment 1965 and subsequent years of assessment ending with 1970. For the years of assessment 1968 and 1970 the appellant assessed the respondents to income tax on the sums of $7,040/- and $33,234/- respectively as their income in respect of rents, under section 4(d) of the Income Tax